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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

FERID MAŠIĆ,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The Department of Labor & Industries rejected Ferid Mašić's workers' compensation claim. Mašić missed his 60-day appeal deadline, although he admittedly received the rejection order, had it translated, and hired his attorney well within the appeal period. Mašić claimed that his receipt of the order was delayed and that he received it the day his mother died. That claim was not credible in light of his later admission that his mother was still alive. The Board of Industrial Insurance Appeals, the superior court, and the Court of Appeals all found no excuse for his delay.

The Court of Appeals, in its unpublished opinion, properly followed precedent in upholding the conclusion that Mašić's claimed limited English proficiency (LEP) did not excuse his late appeal. The Board, throughout its recorded proceeding, properly provided him with an interpreter, whose use he did not question at the hearing, in his Board petition for review, or at the superior court. Review is not warranted.¹

¹ Mašić raises issues on the existence and the scope of LEP claimants' right to interpreter services. Similar arguments were raised and rejected by the Court of Appeals in four other cases involving six other Bosnian-speaking claimants represented by the same attorney who represents Mašić. See *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008) (three consolidated cases); *Ferenčak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 175 P.3d 1109 (2008); *Resulović v. Dep't of Labor & Indus.*, Supreme Court No. 81758-8. Although review is being sought in all of these cases, these cases are not uniform and do not equally preserve or present the issues claimed. Mašić's case should fail because there was no error in determining the untimeliness of his appeal.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does law or equity require excusing Mašić's late appeal, when he received the order, had it translated, and hired his attorney within the appeal deadline but missed it?
2. Is the Court of Appeals opinion consistent with the established precedent that mere use of English to a LEP person does not violate due process or equal protection?
3. Is the Department *ex parte* claim administration not a legal proceeding covered by chapter 2.43 RCW, because it is neither a court proceeding nor a hearing?
4. Did Mašić fail to challenge or show abuse of discretion in the Board provision of interpreter services?

III. COUNTERSTATEMENT OF THE FACTS

A. Department Claim Administration

In March 2004, Mašić applied for workers' compensation. Mašić (10/25/05) 15, 38, 40;² Certified Appeal Board Record (BR) 74 Ex. 1, 9; Finding of Fact (FF)³ 1. He had two prior claims and had used English in corresponding with the Department. Mašić (10/25/05) 41, (11/9/05)14-16, 25; Owen (11/9/05) 27-28; BR Ex. 10, 11, 16.

² This answer refers to the testimony/statements at the Board proceedings by "TR" or the surname of the witness or the maker of the statement, followed by the date of the proceeding and the page number of the transcript where the testimony/statements are found and refers to the Board admitted exhibits as "BR Ex." The transcripts and the exhibits are in the Certified Appeal Board Record.

³ Findings of Fact refer to those made by the Board and adopted by the superior court. Copies of the superior court order (CP 1-3), Board order (BR 2, 62-72), and the Department order (BR 74) at issue are attached as Appendices A, B, and C, respectively.

In April 2004, the Department issued an order rejecting Mašić's claim for an absence of an employment relationship. BR Ex. 3; FF 1. In May 2004, Mašić filed a timely English-written protest and request for reconsideration, stating that he was an employee of Seattle Concrete Design.⁴ BR Ex. 4; FF 1. On September 28, 2004, the Department issued an order affirming the rejection. BR 74 (App. C) (rejection order); FF 1.

On October 28, 2004, Mašić notified the Department that his attorney would handle his industrial insurance matters.⁵ BR Ex. 6 (App. F). As he later conceded, under normal mail delivery, the rejection order was "rebuttably assumed to [have been] received 3 days later on October 1". BR 1755. The 60th day after October 1 was November 30. BR Ex. 8 (2004 calendar). On December 6, 2004, Mašić appealed the order to the Board, asserting that, being LEP, he did not understand the consequence of failing to appeal within 60 days.⁶ BR Ex. 7 at 1 (App. G); FF 3.

B. Discovery Deposition

The Department took a discovery deposition of Mašić, providing, at its expense, an interpreter Vera Brankovan, who Mašić requested. BR 547; TR (8/24/05) 20. After the deposition, Mašić asked the industrial appeals judge (IAJ) to not use Brankovan for the hearing and to direct the

⁴ Copies of the April 2004 order (BR Ex. 3) and Mašić's protest and request for reconsideration (BR Ex. 4) are attached as Appendices D and E, respectively.

⁵ A copy of the notice of representation (BR Ex. 6) is attached as Appendix F.

⁶ A copy of Mašić's notice of appeal (BR Ex. 7) is attached as Appendix G.

Department to pay for his expenses in hiring another interpreter to review the deposition transcript. BR 882-900. The IAJ denied reimbursement but did not rule on the use of Brankovan then. TR (8/24/05) 21.

C. Board Hearing

The Board conducted hearings on the timeliness of Mašić's appeal and provided, at its expense, interpreter Brankovan throughout the recorded hearings. Mašić claimed that a man who lived in the same apartment complex brought the rejection order to him on October 9 or 10 and told Mašić he "took all the mail out and by mistake opened everything". Mašić (10/25/05) 32. Mašić testified he always remembered that day, because it was the day his mother died.⁷ Mašić (11/9/05) 224-25. He had the order translated and met with his attorney on October 28, 2004. Mašić (10/25/05) 34; (11/9/05) 199-200. An interpreter was present, so he was able to communicate with his attorney. Mašić (11/9/05) 200-01.

Three other witnesses testified on Mašić's English proficiency.⁸

⁷ Mašić testified at pages 224-25 of the November 9 transcript:

Mašić: And I will always remember that day.
Q: Why were you chagrined?
Mašić: My mother died.
Q: Your mother died on October the 9th?
Mašić: Yes. They told me. They called me from Bosnia, and told me that she died.

⁸ John Chadwick, a dean at Renton Technical College, testified that Mašić was placed in ESL 5, which indicated his ability to read well and "skills for studying, and figuring out – looking up words, and strategies for . . . reading." Chadwick (11/9/05) 38, 46, 51. Marcia Arthur, an ESL instructor, testified, based on the college record, that Mašić should be able to understand the rejection order by looking up certain words.

The IAJ initially ruled Mašić's appeal timely, relying on his testimony that he received the order on the day his mother died. TR (11/18/05) 25-26.

Seattle Concrete Design moved to vacate the timeliness ruling, stating that Mašić's mother was still alive. BR 1403-88. Mašić responded (BR 1545-1601, 1747-1920), admitting that his mother was alive but now stating that he received a call from his uncle on October 9 or 10 and, with a bad phone connection, believed his uncle said his mother had died, and his family "refer to this as the time [his] mother 'died.'" BR 1551.

The IAJ rejected Mašić's claim about the date he received the order and dismissed his appeal as untimely, and the Board denied review. BR 2, 62-72 (App. B). Mašić appealed to King County Superior Court.

D. Court Proceedings

The superior court affirmed. CP 1-3 (App. A). The court concluded that neither the Department nor the Board violated any of Mašić's statutory or constitutional rights and that Mašić was not entitled to equitable relief from the appeal limits. CP 3 (Conclusion of Law 2.3).

In an unpublished opinion, the Court of Appeals affirmed, by following its recent published opinions in *Ferenčak*, *Kustura*, and *Meštrovac*. This petition followed.

Arthur (11/9/05) 91-92. Gibb Kingsley of the Department of Licensing testified that Mašić obtained a commercial driver's license in June 2001. Kingsley (11/9/05) 137-38.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Mašić argues that the Court of Appeals opinion conflicts with precedent and that his petition raises an issue of substantial public interest that this Court should determine. Petition at 20. Mašić presents a number of issues juxtaposed with a variety of constitutional provisions, statutes, rules, and policies, some raised for the first time before this Court. Mašić offers scant analysis or authority to support his petition.

The Court of Appeals correctly followed established precedent in upholding the dismissal of Mašić's untimely appeal and rejecting his broad claim for free interpreter services beyond what was provided. *Ferenčak, Kustura, Meštrovac*, and consistent precedent provide sufficient guidance on the issues raised. Review is not warranted. *See* RAP 13.4(b).

However, if the Court decides that a certain issue meets the review criteria, the Court should identify and limit review to that issue.

A. **Mašić's Receipt Of The Order Started The Appeal Period, And Equitable Relief Was Properly Denied For Lack Of Diligence**

This Court has held that it is the claimant's receipt, not subjective understanding, of an order that constitutes "communication" to trigger the 60-day appeal period under RCW 51.52.060. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 951-53, 540 P.2d 1359 (1975) (extremely

illiterate Spanish-speaking worker received a claim closing order).⁹

Mašić argues that the rejection order did not trigger the appeal period because it did not use “black faced” type in stating his appeal right.¹⁰ Petition at 5. He waived this argument by failing to raise it at the Board. Op. at 9; RCW 51.52.104 (party filing petition for review at the Board “shall be deemed to have waived all objections or irregularities not specifically set forth therein”); BR 3-33 (Mašić Board petition for review).

Further, the appeal right statement in RCW 51.52.050 is “merely a warning of the statutory requirement that an appeal must be taken within sixty days” and “does not affect the validity of the communication of the ‘order’ . . . to the person who receives it.” *Porter v. Dep’t of Labor & Indus.*, 44 Wn.2d 798, 800, 271 P.2d 429 (1954) (order did not contain the language that appeal must be made to the Board in Olympia). A technical deviation from the statute, “while not to be approved, is not particularly

⁹ Without analysis or support in the record, Mašić claims, “Because the Department knew the English-only orders could not be read by the worker in this case, arguably the orders were never communicated to him”. Petition at 14 n.14. His passing claim without discussion of *Rodriguez* does not merit review. See *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (court “will not review issues for which inadequate argument has been briefed or only passing treatment has been made”). *Rodriguez* has not been overruled or changed by the legislature and appropriately determines the date of communication of the order. Mašić points to Board Exhibit 2 to assert he informed the Department of his lack of English fluency. Petition at 2. Exhibit 2 is not a copy of any letter he sent to the Department and bears no date. TR (10/25/05) 27-28; BR Ex. 2. Nor does it request translation; it states Mašić has an interpreter.

¹⁰ A final Department order must contain “a statement, set in black faced type of at least ten point body or size, that such final order . . . shall become final within sixty days from the date the order is communicated to the parties unless” a written reconsideration or an appeal is filed. RCW 51.52.050.

important.” *Porter*, 44 Wn.2d at 800-01. Mašić can show no prejudice from the use of capitalized (in lieu of bold) letters, when he had the order translated, hired his attorney, but appealed late.

Equity did not rescue Mašić’s late appeal, because he failed to show diligence. Op. at 8-9. It is well-established that equitable relief from the 60-day appeal limits requires diligence. *See Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997) (equitable relief properly denied when the claimant “did not diligently pursue remedies available to her”);¹¹ *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (“Equity aids the vigilant, not those who slumber on their rights.”); *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (same); *Dep’t of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) (same); *Kustura*, 142 Wn. App. at 673 n.20 (claimants had counsel or access to interpreters and failed to explain failure to timely appeal).¹²

¹¹ The *Kingery* dissent was in accord with the diligence requirement but believed diligence was shown there. *See Kingery*, 132 Wn.2d at 182 (Alexander, J., dissenting).

¹² Requiring diligence by a LEP person for equitable relief accords with the law in other contexts that require diligence and further inquiry to such a person. *See* discussion *infra*, IV(B) (due process); *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008) (“diligence requirement of equitable tolling [for habeas corpus]” imposes a duty to “make all reasonable efforts to obtain assistance to mitigate his language deficiency”); *Mendoza v. Carey*, 449 F.3d 1065, 1069-70 (9th Cir. 2006) (courts “have rejected a per se rule” that language limitations can justify equitable tolling). The courts have denied relief also when the claimant fails to show inability to understand the order and the Department misconduct. *See Kingery*, 132 Wn.2d at 174 (plurality); *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005).

Mašić cites *Rodriguez*, to argue that relief is required when the Department should have known the claimant's illiteracy and would not suffer prejudice. Petition at 12-13. But Mašić is not illiterate.¹³ Nor does *Rodriguez* support him, because the "extremely illiterate" Spanish-speaking Rodriguez showed diligence; Mašić did not.¹⁴ This Court has confirmed that diligence is required, and no conflict is thus presented by the denial of equitable relief in this case. *See Kingery*, 132 Wn.2d at 178. Mašić had access to an interpreter and "had filed a protest to the original order denying his claim, and was thus familiar with the process." Op. at 9; Mašić (10/25/05) 34, BR Ex. 4. He was represented by his attorney for over half of the 60-day appeal period. Op. at 9; Mašić (11/9/05) 199-201; BR Ex. 6 (App. F); BR Ex. 8. He failed to explain his failure to untimely appeal except with his rejected claim he received the order slightly late. Equitable relief was properly denied.¹⁵

¹³ Evidence indicated Mašić's ability to read in English quite well by looking up certain words. Chadwick (11/9/05) 38, 46, 51; Arthur (11/9/05) 91-92. As the IAJ stated, "I truly believe that [Mašić's] level of understanding and communication in English is far greater than he leads on." BR 69 (App. B). Mašić claims he suffered post traumatic stress disorder. Petition at 2. But his claim is not supported by any evidence; the documents he refers to (BR 2052-61) are those attached to his Board pleading.

¹⁴ *See Rodriguez*, 85 Wn.2d at 949-50 (worker received the order when his interpreter was hospitalized and his mother in Texas was to undergo surgery; he left for Texas, notifying the Department by his doctor of his change of address, and within 60 days of his return, had the order translated and appealed it).

¹⁵ Equitable relief is "extraordinary" relief and "discretionary" with the trial court. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006).

Mašić argues, for the first time here, that Industrial Insurance Act requires uniformity in timeliness. Petition at 5-6. His argument is too late and lacks merit. *See* RAP 2.5(a). The Act sets a uniform 60-day appeal period, and equity rescues diligent workers in extraordinary cases. Mašić failed to show diligence and offers no reason why LEP claimants need not be diligent or how the statutes he cites (Petition at 6 n.7) show otherwise.¹⁶ The Court of Appeals opinion accords with this Court's decisions in *Rodriguez* and *Kingery*. Mašić fails to show any basis for review.

B. Well-Established Precedent Supports The Court Of Appeals Conclusion That The Department Use Of English To Mašić Did Not Violate Due Process Or Equal Protection

Mašić argues that the Department violated due process and equal protection by sending him an English order. Petition at 13-17. The established precedent rejects this argument. He fails to show otherwise.¹⁷

1. The Department order satisfied due process

Due process requires notice reasonably calculated to inform interested parties of the pendency of the action and afford them an

¹⁶ Mašić asserts that in *Ferenčak*, the Board found a different claimant's appeal timely because it was filed within 60 days after an interpreter communicated to the claimant of the Department order. Petition at 6. But the timeliness in *Ferenčak* was based on the parties' stipulation. Mašić fails to explain how such an agreement in an unrelated case with distinct factual circumstances has any relevance here.

¹⁷ The Department will not engage in separate due process or equal protection analyses under Washington's Constitution, because Mašić never made any such analysis or claimed that a greater protection is provided under Washington's. Nor has he attempted the analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

opportunity to present their objections. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Mašić fails to address the well-established precedent that, in civil cases involving only economic interests as here, due process does not require government to provide notices or services to LEP persons in their primary languages.¹⁸ None of the cases cited by Mašić holds otherwise.¹⁹

Moreover, due process requires “diligence and further inquiry” by a LEP person receiving an English notice. *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909; *Guerrero*, 512 P.2d at 836; *Nazarova*, 171 F.3d at 483. The rejection order contained Mašić’s name, claim number, injury date, the Department’s name, address, and phone number. BR 74. The order would alert a reasonable LEP claimant that a further inquiry is

¹⁸ *See Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (social security benefit denial notice), *cert. denied*, 466 U.S. 929 (1984); *Guerrero v. Carleson*, 512 P.2d 833, 836-37 (Cal. 1973) (welfare benefit), *cert. denied*, 414 U.S. 1137 (1974); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (unemployment benefit); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-78 (N.J. 1982) (same); *Hernandez v. Dep’t of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (same); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-10 (Mass. 1975) (condemnation); *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (administrative seizure); *Kustura*, 142 Wn. App. at 675-77 (workers’ compensation); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (English civil service exam); *see also Nazarova v. INS*, 171 F.3d 478, 483 (9th Cir. 1999) (deportation hearing notice).

¹⁹ *See Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (Arizona’s constitutional amendment broadly banned public employees’ use of non-English languages); *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (a tax lien house sale after its notice sent by a certified mail was returned unclaimed). The Department does not prohibit use of any non-English language, and, unlike the house owner who never received notice in *Jones*, Mašić received the order, had it translated, hired his attorney, but appealed it late.

required – in fact, Mašić did obtain an interpreter and an attorney. Mašić (10/25/05) 34, (11/9/05) 199-201. Due process does not require more.

2. The Department order satisfied equal protection

The standard of review under equal protection in a case that does not involve a suspect class or a fundamental right is a minimal “rational basis” scrutiny.²⁰ *Seattle Sch. Dist. No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991) (citation omitted).

In claiming that the Department’s use of English created a national origin suspect class, Mašić fails to address the well-established precedent: “Language, by itself, does not identify members of a suspect class.” *Soberal-Perez*, 717 F.2d at 41; *Olivo*, 337 N.E.2d at 911 (inability to read English is “not a suspect class”); *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 122 (S.D.N.Y. 1991) (same), *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) (same); *Kustura*, 142 Wn. App. at 685 (same).²¹

²⁰ Mašić does not claim that this case involves a fundamental right, properly so, because workers’ benefits are “finite state resources,” not a fundamental right. *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 739, 57 P.3d 611 (2002). Without reference to the record, Mašić asserts that the Department’s policy is to send orders only in English except for Spanish-speaking claimants. Petition at 14. The Department’s policy is to provide interpreters for specified oral and written communications for LEP claimants and authorize translation of written documents to and from unrepresented LEP claimants upon request. Management Update (App. H).

²¹ Mašić points out language in Executive Order 13,166, 65 Fed. Reg. 50,121, 2000 WL 34508183 (Aug. 11, 2000), that federally-assisted programs should be made meaningfully accessible to LEP persons to avoid Title VI-proscribed discrimination. Petition at 15. But he fails to explain how this language contradicts, or can overrule, the

The courts have consistently upheld use of English to LEP persons under equal protection.²² Mašić claims that preserving state funds is *not in itself* a sufficient ground. Petition at 17 (citing *Willoughby*, 147 Wn.2d at 741). But added cost is not the only ground; the Department has a legitimate interest in using the common language used in this state to provide swift relief to injured workers.²³ Mašić's reliance on a foreign accent employment discrimination case is misplaced.²⁴ There is a distinction between a foreign accent and LEP. *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F. Supp.2d 981, 1030 n.31 (S.D. Iowa 2006) (distinguishing termination for a foreign accent from that for inability to "understand and communicate in English"). A Bosnian accent may identify a Bosnian national; inability to speak English does not.

established precedent that language alone does not create a national origin classification. EO 13,166 is "intended only to improve the internal management of the executive branch" and "does not create any right or benefit, substantive or procedural, enforceable at law or equity". Exec. Order No. 13,166 § 5. Title VI prohibits only intentional discrimination, and there is no private right to enforce regulations made under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 280-91, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

²² See *Carmona*, 475 F.2d at 739; *Soberal-Perez*, 717 F.2d at 42-43; *Olivo*, 337 N.E.2d at 911; *Guerrero*, 512 P.2d at 837-39; *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978); *Frontera*, 522 F.2d at 1218-20; *Moua*, 324 F. Supp. 2d at 1139 (police not providing interpreter for crime victims did not violate equal protection); *Kustura*, 142 Wn. App. at 687.

²³ See *Soberal-Perez*, 717 F.2d at 42 ("English is the national language of the United States."); *Frontera*, 522 F.2d at 1220 ("Our laws are printed in English and our legislatures conduct their business in English."); *Olivo*, 337 N.E.2d at 911 (same); 8 U.S.C. § 1423 (generally requiring English literacy for nationalization); RCW 28A.180.040(1) (transitional bilingual instruction to "achieve competency in English").

²⁴ *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 844 P.2d 389 (1993) (employer conceded discrimination violating RCW 49.60 based on foreign accent).

Mašić complains that the Department provides some services in Spanish. Petition at 16. Equal protection allows a step at a time approach to attacking a societal issue, as long as the practice is “rationally based and free from invidious discrimination.” *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Providing Spanish services does not show any invidious discrimination against Mašić. It only reflects the recognition that English and Spanish are the primary languages used in this state. *See Kustura*, 142 Wn. App. at 687.

The Court of Appeals opinion accords with established due process and equal protection law. Mašić fails to show any basis for review.

C. Chapter 2.43 RCW Does Not Apply To Department Claim Administration, And The Board Properly Provided Mašić With A Qualified Interpreter Throughout The Hearing

The Court of Appeals properly followed *Kustura*, *Meštrovac*, and *Ferenčak* to conclude that Washington interpreter statute, chapter 2.43 RCW, does not apply to the Department claim administration or require the Board to pay for interpreter services. Op. at 4-5. Given the published opinions in *Kustura*, *Meštrovac*, and *Ferenčak*, review is unnecessary.

The statute requires appointment of an interpreter for a LEP person involved in a “legal proceeding.” RCW 2.43.030(1). The statute defines a “legal proceeding” as a (1) court proceeding, (2) grand jury hearing, or (3) hearing before an inquiry judge or an administrative agency:

“Legal proceeding” means a proceeding in any court in this state, grand jury hearing, or *hearing* before an inquiry judge, or *before an administrative* board, commission, *agency*, or licensing body *of the state* or any political subdivision thereof.

RCW 2.43.020(3) (emphasis added). The prepositional phrase “before an administrative . . . agency . . . of the state” modifies only the immediately preceding noun “hearing.” *Kustura*, 142 Wn. App. at 680; *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (unless contrary intent appears, qualifying words “refer to the last antecedent”).

The Department *ex parte* claim administration process is not a court proceeding, grand jury hearing, or hearing. Mašić does not argue otherwise. Thus, chapter 2.43 RCW does not apply to the process.

Mašić argues that the Department claim administration is a “legal proceeding” by reading the phrase “or before an administrative . . . agency . . . of the state” to modify all the preceding phrases, including “a proceeding in any court in this state.” Petition at 8-9. His interpretation does not work for several reasons, but particularly because the modifying phrase cannot grammatically follow another antecedent “grand jury hearing.” *See Berrocal*, 155 Wn.2d at 593-94 (last antecedent rule requires the modifier to “follow any one of the phrases, standing alone, to produce a structurally seamless sentence”).

The Board hearing is a “legal proceeding,” but the Board was not required to pay for interpreter services, because it did not initiate the proceeding. RCW 2.43.040. The statute allocates interpreter costs to “the governmental body initiating the legal proceeding,” RCW 2.43.040(2), or to “the non-English-speaking person, unless such person is indigent,” RCW 2.43.040(3).²⁵ The statute thus contemplates that some proceedings are initiated by individuals. Here, Mašić initiated the proceeding by filing an appeal, triggering the Board jurisdiction. RCW 51.52.060. He never claimed indigency. The statute thus allocated interpreter costs to him.

Mašić argues, for the first time here, that the Department initiated a legal proceeding because it is required by RCW 51.04.020(6) to “investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations”. Petition at 9. His argument is waived. *See* RAP 2.5(a). Further, it makes no sense. There is no evidence the Department investigated the cause of Mašić’s alleged injury; the Department rejected his claim for a lack of an employment relationship. BR Ex. 3; BR 74. His unsupported claim that the Department acts like police in other contexts

²⁵ The due process law likewise distinguishes “government-initiated proceedings seeking to affect adversely a person’s status” from “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999) (no right to interpreter at INS interview for special agricultural worker status).

(e.g., issuing WISHA²⁶ citations or investigating fraud) is irrelevant.

Mašić argues that differently treating hearing-impaired and LEP persons violates equal protection, citing RCW 2.42.120(4) (providing interpreter services to a hearing-impaired person interviewed by law enforcement in a criminal investigation) and *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999) (convicted defendant may not be assessed interpreter cost under RCW 2.43.040(4)). Petition at 10-11. But the Department did not interview Mašić in any criminal investigation.²⁷ *Marintorres* is a criminal case, involving a Sixth Amendment interpreter right. See *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). In civil cases, it is not irrational to differently address interpreter services for the hearing-impaired and LEP. “A hearing impairment is a physical disability”; LEP is not. Op. at 12 n.6. Sign language covers most hearing-impaired, while there are thousands of languages.²⁸

Although not required, the Board provided Mašić with an interpreter throughout the hearing. See WAC 263-12-097 (the Board may

²⁶ Washington Industrial Safety & Health Act, chapter 49.17 RCW.

²⁷ Mašić’s reliance on cases in different legal contexts is misplaced. See *State v. Smith*, 97 Wn.2d 856, 859-63, 651 P.2d 207 (1982) (assault victim’s under oath statement to police that is inconsistent with the victim’s testimony is not hearsay); *Davis v. Washington*, 547 U.S. 813, 826-30, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (statements to law enforcement during a 911 call to resolve emergency was not “testimonial” and did not trigger the Confrontation Clause, but a victim’s statement in affidavit to police during investigation of a possible crime was “testimonial”).

²⁸ There are 6900 plus living languages in the world. Raymond G. Gordon, Jr., *Ethnologue: Languages of the World* (15th ed. 2005), available at <http://www.ethnologue.com>; see also *World Almanac & Book of Facts* 731-32 (2006).

pay for an interpreter). Mašić's complaint about the qualifications of interpreter Brankovan was waived, as he did not raise it at the hearing, in his petition for review to the Board, or at the superior court. Op. at 8 n.2; TR (10/25/05) 6-7;²⁹ BR 3-33; CP 41-223, 261-304, 308-44.³⁰

Mašić argues that the Board was required to reimburse him for his expenses in hiring an interpreter to "correct his deposition." Petition at 7. This argument was properly rejected for the above reasons and because the deposition was not part of the Board hearing. Op. at 5.³¹ The Department paid for Brankovan's services, and Mašić requested Brankovan for the deposition. BR 547, 565-66; TR (8/24/05) 20. Costs or attorney fees may be awarded to a worker only if he prevails on the merits in court, only for fees incurred in court. RCW 51.52.130 (fourth sentence). Mašić's policy argument that all LEP claimants should receive

²⁹ Asked whether Mašić would object to using Brankovan, his attorney said, "I believe that we've addressed everything in writing to the Court on this matter." Owen (10/25/05) 6-7. The IAJ asked again, "Well, I'm asking you today how you feel today. Any objection today?" IAJ (10/25/05) 7. Mašić's attorney said, "Nothing further today, Your Honor." Owen (10/25/05) 7.

³⁰ Also, Mašić fails to show Brankovan was not qualified. He claims Brankovan showed problems during his deposition. Petition at 11. But none of the documents he refers to (mostly his own assertions in Board pleadings) proved his claim, which the IAJ properly rejected. See *Gonzales-Morales*, 138 Wn.2d at 381 (interpreter appointment is within the trial court's discretion). Mašić claims that Brankovan said there was no exact word for "claim" in Bosnian. Petition at 4 n.2. He fails to show the use of the word "benefits" in translating "claim," Brankovan (11/9/05) 20, shows any interpretive defect.

³¹ Mašić's prejudice argument in reliance on *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997) (party may waive right to arbitration by first conducting lengthy and aggressive litigation), is thus misplaced. In any event, prejudice in the arbitration right waiver context is different from prejudice that *may justify a reversal* – "Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal." *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987).

free interpreter services related to their claims is inconsistent with RCW 2.43.040(3) and RCW 51.52.130 and should be made to the Legislature.³²

Mašić argues, for the first time, that GR 33 requires free interpreter services and that the rule applies to the Board under WAC 263-12-125.³³ Petition at 18-19. His argument is waived. RAP 2.5(a). Further, GR 33 requires accommodations (with certain exceptions such as undue burden) to a “person with a disability” covered by the Americans with Disabilities Act, chapter 49.60 RCW, or other similar local, state, or federal laws. GR 33(4). Mašić provides no analysis to show that his asserted limited English proficiency is a “disability” covered by any of such laws.

Mašić claims that interpreter services are “one of the benefits” under Industrial Insurance Act. Petition at 8. But he provides no authority for such a claim, and it should not be addressed. *See Thomas*, 150 Wn.2d at 868-69 (passing unsupported argument does not merit review).³⁴

³² Mašić refers to certain documents entitled *Washington Civil Legal Needs Study, Ensuring Equal Access for People with Disabilities: A guide for Washington Courts*, and *Washington State LEP Plan*. Petition at 18. He fails to explain how these documents create any enforceable right or obligation relevant in this case.

³³ The rule adopts “the statutes and rules regarding procedures in civil cases in the superior courts of this state” if applicable and “not in conflict with these rules”.

³⁴ RCW 51.04.010 generally declares the State’s power to provide compensation. Mašić claims that the Department policy requires an interpreter for medical care under Title VI. Petition at 8 n.9. If he means Department Provider Bulletin 05-04 (Appendix I), it is “advisory only” and does not enforce the law. *Wash. Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003). It describes a federal agency’s Title VI disparate impact analysis, which, as stated above, is not privately enforceable, and this case does not involve the health care interpreter services, which the Department indisputably provides.

D. The Board Properly Considered The Undisputed Fact That Mašić's Mother Was Alive In Discrediting His Testimony

Mašić challenges the IAJ's consideration of the undisputed fact that his mother was alive, solely on the basis that such evidence was collateral impeachment. Petition at 19. The fact Mašić's mother was alive was not collateral to the timeliness decision, which turned on the veracity of his testimony that he recalled the date he received the rejection order as the day his mother died.³⁵ IAJ (11/18/05) 25-26; BR 68-70 (App. B); *State v. Johnson*, 192 Wash. 467, 73 P.2d 1342 (1937) (whether evidence is collateral depends on whether it is relevant to a material issue). Mašić fails to show an abuse of discretion or any basis for review.

V. CONCLUSION

For the reasons stated above, the Department requests that the Court deny Mašić's petition for review.

RESPECTFULLY SUBMITTED this 18th day of August, 2008.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa
MASAKO KANAZAWA
WSBA 32703
Assistant Attorney General
Attorneys for Respondent

³⁵ At the Board, Mašić's attorney argued the credibility of his testimony that he received the order on October 9, 2004 and asserted that he "did not demonstrate him to be sort of man who would lie about the death of his mother. Owen (11/18/05) 4, 6-7.

Appendix A

Superior court order

plans

Inven
~~*Attorney Copy*~~
By 2.9.07
9:00 a.m.

07 MAR -5 PM 3:34

KING COUNTY
SUPERIOR COURT

MAY 2007
FILED
KING COUNTY CLERK

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

FERID MASIC,

Plaintiff,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES, STATE OF
WASHINGTON,

Defendant.

NO. 06-2-17514-0 KNT

~~(PROPOSED)~~ FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Judgment Creditor: State of Washington Department of Labor and Industries
- 2. Judgment Debtor: Ferid Masic
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees: \$200.00
- 6. Costs: \$0
- 7. Other Recovery Amounts: \$0
- 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

~~(PROPOSED)~~ FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

original
COPY

CLERK GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 454-7740

EXHIBIT A

May 14 2007 4:10PM HP LASERJET FAX

1 10. Attorney for Judgment Creditor:

Andy Simons
Office of the Attorney General
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Seattle, WA 98164

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4 11. Attorney for Judgment Debtor:

Ann Pearl Owen
Attorney at Law
2407 14th Avenue South
Seattle, WA 98144

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This matter came on regularly before the Honorable Laura Inveen, in open court on March 9, 2007. Appellant, Ferid Masic, appeared with counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by counsel, Robert M. McKenna, Attorney General, per Andy Simons, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record and briefs submitted by counsel, ^{as set out in the attached hereto,} and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

- 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition. The Industrial Appeals Judge issued an initial Proposed Decision and Order on April 13, 2006 from which Plaintiff filed a timely Petition for Review. The Board denied Plaintiff's Petition for Review, and on May 23, 2006, ordered that the Proposed Decision and Order become the Decision and Order of the Board. Plaintiff thereupon timely appealed the Board's Decision and Order to this Court.
- 1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 2 through 4. The Court adopts as its Findings of Fact, and incorporates by this reference the Board's Findings of Facts Nos. 2 through 4 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.
- 1.3 The fifth paragraph of Board Finding of Fact No. 1 states: "On December 7, 2004, the Board of Industrial Insurance Appeals received a notice of appeal filed on behalf of the claimant from the Department order dated September 28, 2004." This finding is not material, as Finding of Fact Number 3 correctly states that claimant filed his notice of appeal on December 6, 2006. Therefore, with the exception of paragraph 5, which is struck, the Court adopts Finding of Fact No. 1, and incorporates by this reference the modified Findings of Facts Nos. 1 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.

Based upon the foregoing Findings of Fact, the Court now makes the following

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II. CONCLUSIONS OF LAW

- 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.
- 2.2 The Board's Conclusions of Law Nos. 1 through 3 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 3 of the May 23, 2006 Decision and Order which adopted the April 13, 2006 Proposed Decision and Order.
- 2.3 Neither the Department nor the Board violated any of Mr. Masic's statutory rights or due process or equal protection rights under the U.S. or state constitutions regarding interpreter services, nor is Mr. Masic entitled to equitable relief from the time bar of RCW 51.52.060.
- 2.4 The Board's Decision and Order of May 23, 2006, except as modified in Finding of Fact No. 1, is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

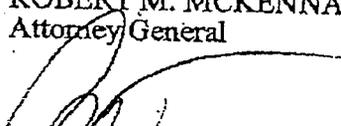
3.1 It is hereby ORDERED, ADJUDGED AND DECREED that the May 23, 2006 Board of Industrial Insurance Appeals Decision and Order, that adopted the April 13, 2006 Proposed Decision and Order that affirmed the Department's September 28, 2004 order that affirmed the Department's April 13, 2004 order that rejected Mr. Masic's claim should be and is hereby affirmed as modified.

DATED this 14 day of ^{May}~~March~~, 2007.



Laura Inveen, JUDGE

Presented by:
ROBERT M. MCKENNA
Attorney General



ANDY SIMONS
Assistant Attorney General
WSBA No. 30186

Appendix B

Board order

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.biaa.wa.gov
(360) 753-6824

In re: **FERID MASIC**

Docket No. 04 25602

Claim No. Y-900479

**ORDER DENYING PETITION
FOR REVIEW**

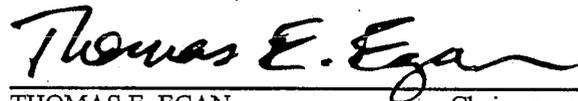
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **MITCHELL T. HARADA** on **April 13, 2006**. Copies were mailed to the parties of record.

A Petition for Review was filed by **the Claimant** on **May 4, 2006**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated this 23rd day of May, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



CALHOUN DICKINSON

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: FERID MASIC) DOCKET NO. 04 25602
2 CLAIM NO. Y-900479) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Mitchell T. Harada
4

5 APPEARANCES:

6 Claimant, Ferid Masic, by
7 Ann Pearl Owen, P.S., per
8 Ann P. Owen

9 Employer, Seattle Concrete Design, by
10 Hecker Wakefield & Feilberg, P.S., per
11 Stephan D. Wakefield

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Andrew J. Simons, Assistant

15 The claimant, Ferid Masic, filed an appeal with the Board of Industrial Insurance Appeals on
16 December 7, 2004 from an order of the Department of Labor and Industries dated September 28,
17 2004. In this order, the Department affirmed a prior order dated April 13, 2004. The claimant's
18 appeal is **DISMISSED**.

19 PRELIMINARY MATTERS

20 On October 25, 2005, a hearing to address the issue of subject matter jurisdiction was held
21 in Seattle, Washington. That hearing was continued to November 9, 2005 in order for all evidence
22 to be presented by all parties. On November 18, 2005, a conference was held at which I made an
23 oral ruling. In my ruling, I stated that I found that the claimant filed a notice of appeal from the
24 September 28, 2004 Department order within sixty days from the date the order was communicated
25 to him as required by RCW 51.52.060. I, therefore, made a finding that the Board of Industrial
26 Insurance Appeals has personal and subject matter jurisdiction to hear the claimant's appeal.

27 During my ruling, I further stated the reasons for my determination on jurisdiction.
28 Essentially I indicated that I believed the claimant when he testified that he received the
29 September 28, 2004 Department order from a neighbor, who received and opened the envelope in
30 which the order was sent because it was mistakenly placed in his mailbox. I placed a great deal of
31 emphasis on the fact that the claimant testified he specifically recalled the date he received the
32 order (Saturday, October 9, 2004) because it was the same day he learned that his mother died. At

1 the time of my oral ruling I indicated that I was persuaded by the claimant's testimony because I
2 found it reasonable to believe the claimant could and would recall what transpired on the day he
3 learned his mother had passed away (in a call from family member from Bosnia, where the
4 claimant's mother purportedly lived).

5 After having made my ruling on jurisdiction, I scheduled hearing dates to take evidence on
6 the hearing on the merits. On November 18, 2005, I also issued an Interlocutory Order Establishing
7 Jurisdiction.

8 On December 13, 2005, employer filed Seattle Concrete Design's Motion For Order To Show
9 Cause Why The Court's Jurisdictional Ruling Should Not Be Reversed. On December 22, 2005,
10 employer filed a Motion for Contempt; a Supplement to Motion For Order To Show Cause; and an
11 Objection to Continue Hearing. Claimant's counsel filed many documents to contest employer's
12 motions. Suffice it to say that most of the pleadings were supplemented with records and
13 declarations of individuals to address the employer's assertion that claimant was untruthful when he
14 testified that his mother died.

15 The employer's position is that the Board has authority under CR 60 or CR 54 to amend its
16 ruling on jurisdiction – even nearly five weeks post hearing. Specifically, employer relies on
17 CR 54(b), which states in pertinent part:

18 (b) Judgment upon multiple claims or involving multiple parties. When
19 more than one claim for relief is presented in an action, whether as a
20 claim, counterclaim, cross claim, or third party claim, or when multiple
21 parties are involved, the court may direct the entry of a final judgment as
22 to one or more but fewer than all of the claims or parties only upon an
23 express determination in the judgment, supported by written findings,
24 that there is no just reason for delay and upon an express direction for
25 the entry of judgment. The findings may be made at the time of entry of
26 judgment or thereafter on the court's own motion or on motion of any
27 party. In the absence of such findings, determination and direction, any
28 order or other form of decision, however designated, which adjudicates
29 fewer than all the claims or the rights and liabilities of fewer than all the
30 parties shall not terminate the action as to any of the claims or parties,
31 and the order or other form of decision is subject to revision at any time
32 before the entry of judgment adjudicating all the claims and the rights
and liabilities of all the parties.

33 A conference was held on February 1, 2006 to further discuss the motions filed by employer
and whether a show cause hearing would be necessary. During that conference I determined that I
would issue a new order to address jurisdiction, that no further hearings in regards to jurisdiction
would be held; and that I would not allow any additional filings on the issue of jurisdiction after the

1 date of the conference, February 1, 2006. To the extent that additional documents were filed, they
2 were not considered for purposes of issuing this decision.

3 ISSUE

4 Whether the claimant filed a timely protest and request for
5 reconsideration or appeal from the Department of Labor and Industries
6 order dated April 13, 2004.

7 EVIDENCE PRESENTED

8 A jurisdictional hearing was held originally on October 25, 2005; the hearing was continued
9 to November 9, 2005 in order for all confirmed witnesses to be able to testify fully.

10 At the time of his injury, the claimant, Ferid Masic, lived in an apartment in Tukwila,
11 Washington. Since that time he has moved to a different address in Tukwila. He lives there with
12 his wife and two children. Mr. Masic arrived in this country in 1999 from the former Yugoslavia
13 where he learned his native language of Serbo-Croatian. Mr. Masic testified that when he arrived in
14 the United States speaking Bosnian, and did not speak English.

15 Mr. Masic enrolled in an English as a Second Language (ESL) course at Renton Technical
16 College in Renton, Washington. Mr. Masic testified that "they put me in a class where I did not
17 understand anything. I came twice and after not understanding I basically left and did not continue
18 study." 10/25/05 Tr. at 14. When Mr. Masic reviewed a copy of his application for benefits in this
19 case, he said that "he [the interpreter] filled out this form because I don't speak English. I cannot
20 read English." 10/25/05 Tr. at 20. Mr. Masic utilized the services of Ruslan Tumbic to assist in
21 writing letters on his behalf in regards to this claim; those letters type-written were typed by
22 Mr. Masic's wife.

23 Mr. Masic testified that he did not receive the September 28, 2004 order on appeal (Exhibit
24 No. 5) until about ten days after the date of the Order. He believes the day he received the order
25 was a Saturday, and the date of his receipt was October 9, 2004 or October 10, 2004. (A review of
26 a 2004 calendar indicates that October 9, 2004 was a Saturday). The claimant testified that he
27 received the (opened) envelope containing the September 28, 2004 Department order from a
28 neighbor who lived in the same apartment complex as he. The neighbor explained that he was
29 absent and when he returned and opened the mail, the neighbor also opened the envelope mailed
30 to Mr. Masic. When testifying, Mr. Masic could not provide the identity of this neighbor who
31 supposedly received this one envelope by mistake; neither could he provide the unit number where
32 this individual lived. Mr. Masic said that after he received the Department order dated
September 28, 2004, someone speaking English (was present) and translated it for him. Mr. Masic

1 testified that after it was translated, "he asked her to call a lawyer for [him] to make an
2 appointment." 10/25/05 Tr. at 34. Mr. Masic then stated that he received his attorney's notice of
3 appeal in the mail. It appears that the lawyer sent the document on December 6, 2004, and
4 presumably it was received by the Board of Industrial Insurance Appeals on December 7, 2004.

5 After discussion about the nature of the evidence presented by the claimant, the
6 jurisdictional hearing was continued to November 9, 2005 for cross-examination and to provide
7 additional time for the employer and Department to further prepare its defense.

8 On November 9, 2005, Mr. Masic testified, more about the specifics of receiving the
9 September 28, 2004 order from his apartment complex neighbor. Mr. Masic was then asked
10 whether his wife saw the man who delivered the order (neighbor), and he answered she did. Then
11 this discussion took place:

12 Q: Did she know him?

13 A: Yes, she did. She was there. And that was the day that I was really ... [chagrined].

14 A: I will always remember that day.

15 Q: Why were you chagrined?

16 A: My mother died.

17 Q: Your mother died on October the 9th?

18 A: Yes. They told me. They called me from Bosnia and told me she died.

19 11/9/05 Tr. at 224, 225.

20 Mr. Masic further testified that he had the assistance of an interpreter when taking and
21 passing the written portion of the state driver's license examination. He also addressed the CDL
22 requirements and stated that 90 percent of the practical portion of the examination dealt with hand
23 signals.

24 During the hearing held on November 9, 2005, John Chadwick testified that he is the Dean
25 of basic studies at Renton Technical College where he, as part of his duties, oversees English as a
26 Second Language (ESL) classes. Mr. Chadwick testified that the claimant registered for a property
27 management class after having been tested to determine his level of English proficiency. He said
28 that Mr. Masic took a Comprehensive Adult Student Assessment Test (CASAS), which is used to
29 determine one's employability level. Mr. Masic tested at Level 5 (with the range from 1 to 6, with 6
30 being the highest level). Mr. Chadwick clarified that this would mean that Mr. Masic would
31 understand almost everything said to him, and that he would be understood almost all of the time
32 by an English speaking person.

1 The next witness was Marcia Arthur, and ESL teacher at Renton Technical College.
2 Ms. Arthur has over twenty years of experience in teaching ESL courses. During her testimony she
3 provided her opinions on what level of English competency one would need in order to comprehend
4 certain legal documents, including the Department of Labor and Industries Decision and Order of
5 April 13, 2004. Ms. Arthur was of the opinion that a Level 4 ESL student would, with use of a
6 dictionary for a small number of words, be able to comprehend most of the contents of the Order.
7 Ms. Arthur stressed that the language contained in the order is relatively formal and would put the
8 reader on notice that legal action is involved.

9 Gibb Kingsley manages the commercial driver's license program with the Department of
10 Licensing in this state. Mr. Kingsley testified to the requirements for one to receive a commercial
11 driver's license (CDL) for drivers to operative very large vehicles, typically those above 26,000
12 pounds that include combination vehicles and buses. The applicant for a CDL is required to pass a
13 written examination, which can be administered in the applicant's native language, and a vehicle
14 inspection test, which is given exclusively in English. Mr. Kingsley explained that the hands-on
15 vehicle inspection portion of the examination is given only in English because it is essential for the
16 applicant/driver to communicate crucial information in English in case of an emergency.
17 Mr. Kingsley also testified that Mr. Masic obtained a CDL in Washington State on July 29, 2001.

18 Mike Bethany, a senior technical specialist for the Department of Licensing, also testified on
19 behalf of the Department of Labor and Industries on November 9, 2005. Mr. Bethany described the
20 testing process for one seeking a Washington State driver's license (non-commercial). He said that
21 the Bosnian language is not one of the non-English languages in which the written examination is
22 administered. Mr. Bethany confirmed that the claimant received his driver's license on January 18,
23 2000.

24 As stated previously, when the employer filed its Motion to Show Cause, the motion
25 contained several attachments that was filed to establish that the claimant's mother was not dead.
26 She may have been ill, but that was not near in time to October 9, 2004. Claimant's counsel filed
27 several other documents to counter employer's assertions; however, the claimant did not deny that
28 his mother was actually alive. The main argument of claimant was essentially that when he testified
29 about his mother, claimant actually said dying and not dead. The claimant argues that the
30 confusion was caused by there being less than accurate translation provided for during the
31 jurisdictional hearings.

1 DECISION

2 The sole issue in this appeal is whether the claimant filed a notice of appeal from the
3 Department order dated September 28, 2004 within sixty days of the date the order was
4 communicated to the claimant pursuant to RCW 51.52.060.

5 The particular statute that addresses the time frame for a party to file a protest or appeal from
6 a Department order is RCW 51.52.060, which states in pertinent part:

7 § 51.52.060. Notice of appeal -- Time -- Cross-appeal -- Departmental
8 options

9 (1) (a) Except as otherwise specifically provided in this section, a
10 worker, beneficiary, employer, health services provider, or other person
11 aggrieved by an order, decision, or award of the department must,
12 before he or she appeals to the courts, file with the board and the
13 director, by mail or personally, within sixty days from the day on which a
14 copy of the order, decision, or award was communicated to such
15 person, a notice of appeal to the board ...

16 The law is well established that failure to file an appeal within the time prescribed by statute
17 prohibits this Board from considering the merits of an appeal and that the burden is on the appellant
18 to prove that the appeal was timely. *In re John Karns*, BIIA Dec., 05,181 (1956) citing *Nafus v.*
19 *Department of Labor & Indus.*, 142 Wash. 48.

20 There was no issue raised about whether the Department actually issued the order of
21 September 28, 2004 on that same day. Neither the Department nor the employer called a witness
22 to establish such a fact. However, the presumption is that the government mails proceed in due
23 course, and that a letter duly addressed to a person, with the postage thereon fully paid, is received
24 by the person to whom it is addressed. This presumption has the force of evidence, and is
25 sufficient to justify a finding that such is the fact, in the absence of anything to the contrary.
26 *Avergionion v. First Guaranty Bank*, 142 Wash. 73 (1927).

27 If the order was issued on September 28, 2004, and the usual course of government mails
28 from Olympia to Tukwila is at most three business days, this would mean in the ordinary course of
29 mail handling, the order of September 28, 2004 would have been delivered to the claimant's
30 address no later than October 1, 2004. The first question becomes when did the claimant receive
31 the order; the next question is when was the order actually communicated to him.

32 Previously, I found the claimant credible when testifying that he received the order on
October 9, 2004 from his neighbor. During that same stretch of testimony it was implicit that the
claimant had someone nearby (a female) who translated the order on the same day. Besides that

1 portion of his testimony that focused on October 9, 2004, the claimant recalled other relevant dates
2 rather poorly. But, the claimant appeared credible to me at the time because I found it reasonable
3 that his recall would be complete and accurate about the events that occurred on the day he
4 learned his mother died. Despite the existence of many irregularities and inconsistencies between
5 the claimant's testimony and that provided by other witnesses, I gave the benefit of the doubt to
6 Mr. Masic about his mother's condition. I also stated during my oral ruling that I could vividly recall
7 the claimant's demeanor and presence change when he mentioned that his mother died. I felt that
8 his body language and his tone of voice (in Bosnian) were consistent with someone recalling the
9 date one learns his mother dies.

10 The evidence presented by the employer raises no doubt that Mr. Masic's mother was alive
11 and living in Bosnia on or about November 9, 2004. (Even in the claimant's responses, there is no
12 denial of the mother being alive). Clearly, with this new information, the basis for my initial ruling on
13 jurisdiction was made relying on false testimony.

14 After considering the new evidence about the status of claimant's mother, in determining
15 whether the claimant filed a timely appeal of the September 28, 2004 Department order, as before,
16 much of my determination rests on the claimant's overall credibility.

17 The issue of the ability of the claimant's ability to communicate in English was a central focus
18 of the evidence presented at jurisdictional hearing. The claimant essentially contends that he
19 cannot read, write, speak, or understand English. The employer and Department presented
20 evidence from unbiased witnesses to contradict that contention. Their collective testimony
21 indicates that the claimant passed tests (CDL) and scored high enough (with ESL) to indicate the
22 claimant's level of communicating in English is above that which he claims.

23 Given the new information about the claimant's mother, the surrounding circumstances of
24 when he claims he received the September 28, 2004 order cause me to be much more suspicious.
25 The claimant's unexpected testimony about when he received the order on appeal conveniently fell
26 within sixty days of when his attorney actually filed the appeal (even though the justification for late
27 filing is noted in the notice of appeal, and even though the claimant earlier testified about now
28 knowing much about appeal periods with other claims). The claimant is also unable to recall the
29 identity of the neighbor who dropped by with his mail and does not volunteer any information about
30 how one may learn of his identity. The claimant also elected not to have his wife testify at the
31 jurisdictional hearing to corroborate the delivery from this neighbor and when that may have
32 occurred. (It is also interesting that the claimant just happened to have a female translator present

1 on October 9, 2004 when his neighbor delivered the Department order to Mr. Masic, although this
2 same translator was not present during other important times).

3 One other point brought up by counsel for the employer and Department, was that in the
4 notice of appeal of December 6, 2004, claimant indicates that it is "Not Known" when the claimant
5 received the September 28, 2004 Department order. However, in that same notice of appeal
6 (Exhibit No. 7), claimant implies an admission of there being (at least on its face) non-compliance
7 with the sixty day appeal period. Up to the date of the October 25, 2004 jurisdictional hearing,
8 claimant proceeded under the apparent theory that the claimant did not comply with the
9 requirements of RCW 51.52.060 because the order was not written in the claimant's native
10 language of Bosnian/Serbo-Croatian. It appeared to be with great surprise to the undersigned (and
11 counsel for the employer and Department) when the claimant volunteered that he did not actually
12 receive the September 28, 2004 order until October 9, 2004; this revelation made what appeared to
13 be the main issue -- the issue of translation -- become essentially irrelevant. This last-minute
14 change in theories of his case was understandable when I believed that the claimant could recall
15 the exact date of his receipt of the September 28, 2004 order; however, now that the circumstances
16 for me believing the claimant on his ability to recall the exact date never actually existed, I not only
17 question the claimant's ability to recall the date he received the order, but also his ability to be
18 truthful on any matter.

19 I truly believe that the claimant's level of understanding and communicating in English is far
20 greater than he leads on. When the claimant was asked to describe his ability to use English, and
21 he replied, "very, very -- it's very, very difficult," I believe the claimant was not truly honest with his
22 response. 10/25/05 Tr. at 13. The claimant did not have any witnesses testify to his supposedly
23 low level of English comprehension, so we are left to believe him that he has great difficulty
24 communicating in English. Based on the totality of the testimony, I find it much easier to believe
25 totally unbiased educators and state agency representatives who describe what skill level of
26 English communication is required for someone with Mr. Masic's certifications and school entry
27 scores.

28 Claimant argues that the misinformation about the status of the mother of Mr. Masic is easily
29 explained by considering inaccurate translation when Mr. Masic testified in Bosnian and an
30 interpreter (of a different cultural background than the claimant) translated into English. Such an
31 argument, taken on its own, has merit. But taken in consideration of the other testimony and my
32 observations during the time Mr. Masic testified about his mother having "died," leads me to

1 conclude that the misinformation was not the fault of the interpreter. I mentioned previously of my
2 observations of the claimant's demeanor when he testified his mother "died." The context of his
3 testifying that she "died" makes it appear that his choice of words would make it more reasonable
4 that he said "died" and not "dying." The hearings held on October 25, 2005 and November 9, 2005
5 were full of discussions among all participants in regards to problems with the interpreter either
6 keeping up or fully comprehending what the claimant was saying. Even the claimant would bring
7 up when he felt communication was a problem. During the time when the claimant testified about
8 his mother, there were no problems with pace of speech, and there were no problems about choice
9 of words. In fact, because of the subject matter, I recall there was a slowing of the pace of
10 testimony (that could not be picked up by merely reading the transcript). Overall, the claimant's
11 explanation about translation is not persuasive.

12 FINDINGS OF FACT

- 13
- 14 1. On or about March 23, 2004, the claimant, Ferid Masic, filed an
15 application for benefits with the Department of Labor and Industries in
16 which he alleged he sustained an injury to his left leg and left arm on
17 June 29, 2003 while working in the course of his employment with
Seattle Concrete Design.

18 On April 13, 2004, the Department of Labor and Industries issued an
19 order in which it rejected the claim; stated that the Department of Labor
20 and Industries is unable to substantiate an employer/employee
21 relationship; and stated that all bills concerning this claim are rejected
22 except those authorized by the Department of Labor and Industries for
23 diagnosis.

24 On or about May 11, 2004, the claimant filed a protest and request for
25 reconsideration from the Department order dated April 13, 2004.

26 On September 28, 2004, the Department issued an order that affirmed
27 the prior order dated April 13, 2004.

28 On December 7, 2004, the Board of Industrial Insurance Appeals
29 received a notice of appeal filed on behalf of the claimant from the
30 Department order dated September 28, 2004.

31 On December 29, 2004, the Board of Industrial Insurance Appeals
32 issued an Order Granting Appeal (subject to proof of timeliness),
assigned the appeal Docket No. 04 25602, and ordered that further
proceedings be held.

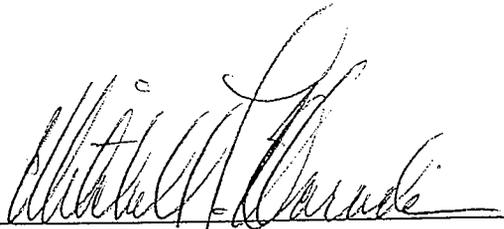
- 1 2. By no later than October 1, 2004, the Department order dated
2 September 28, 2004 was communicated to the claimant in a manner
3 whereby the claimant was able to understand and comprehend its
4 contents.
5
6 3. On December 6, 2004, the claimant filed his notice of appeal from the
7 Department order dated September 28, 2004.
8
9 4. The claimant failed to file a notice of appeal from the September 28,
10 2004 Department order within the time frame required by
11 RCW 51.52.060.

12 CONCLUSIONS OF LAW

- 13 1. The Board of Industrial Insurance Appeals has jurisdiction over the
14 parties to this appeal.
15
16 2. The claimant's notice of appeal filed with the Board on December 6,
17 2004, was not timely filed from the Department order dated
18 September 28, 2004, as contemplated by RCW 51.52.060.
19
20 3. The Board does not have jurisdiction over the subject matter to this
21 appeal. The appeal is dismissed.

22 It is so ORDERED.

23 DATED: APR 13 2006

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Mitchell T. Harada
Industrial Appeals Judge
Board of Industrial Insurance Appeals

RECEIVED
APR 14 2006
AGO L&I DIVISION
SEATTLE

Appendix C

Department order

PRVDR OVERLAKE HOSPITAL MEDICAL CTR
1035 116TH AVE NE
BELLEVUE WA 98004-4604

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

EMP

CLAIM ID : Y900479 TYPE : RE
MAILING DATE : 09-28-04 WRKPOS : PM75
INJURY DATE : 06-29-03 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

CLMT FERID MASIC
3434 S 144TH ST APT 133
SEATTLE WA 98168

NOTICE OF DECISION

	ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL	
	INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 WITHIN 60 DAYS	
	AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL.	

THE DEPARTMENT OF LABOR AND INDUSTRIES HAS RECONSIDERED THE ORDER OF 04-13-04.
THE DEPARTMENT HAS DETERMINED THE ORDER IS CORRECT AND IT IS AFFIRMED.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY BELVA L SHOOK

ACCOUNT MANAGER

FILE COPY

Appendix D

April 2004 order

RVD

OVERLAKE HOSPITAL MEDICAL CTR
1035 116TH AVE NE
BELLEVUE WA 98004-4604

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

1P

CLAIM ID : Y900479 TYPE : RJ
MAILING DATE : 04-13-04 WRKPOS : PM75
INJURY DATE : 06-29-03 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

MT

FERID MASIC
3434 S 144TH ST APT 133
SEATTLE WA 98168

NOTICE OF DECISION

YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER:
THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU
UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN
REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL
WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR
RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION
IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES,
PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND
ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF
INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA, WA 98504-2401.

THIS CLAIM FOR BENEFITS IS HEREBY REJECTED FOR THE FOLLOWING REASON(S):

THE DEPARTMENT IS UNABLE TO SUBSTANTIATE AN EMPLOYER-EMPLOYEE RELATIONSHIP AT
THE TIME OF YOUR ALLEGED INJURY.

ANY AND ALL BILLS FOR SERVICES OR TREATMENT CONCERNING THIS CLAIM ARE REJECTED,
EXCEPT THOSE AUTHORIZED BY THE DEPARTMENT FOR DIAGNOSIS.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY BELVA L SHOOK

POLICY MANAGER

CLAIMANT COPY

Board of Industrial Insurance Appeals

In re: Masic

Docket No. 0425602

Exhibit No. 3

ADM. 10/25/05 Date REJ.

GAH
2

Appendix E

Mašić's protest and request for
reconsideration

DEPARTMENT OF LABOR AND INDUSTRIES
P.O. BOX 44291
OLYMPIA, WA, 98504-4291

FERID MASIC
3434 S. 144TH ST # 133
SEATTLE, WA 98168

CLAIM ID: Y900479

TO WHOM THIS MAY CONCERN.

I received your decision, mailed on 04-13-2004 and I would like you to reconsider it.

I worked with "SEATTLE CONCRETE DESIGN" (Owner Muhamed Hadzimuratovic, License # SEATTC982K2) in 2003. I gave him my social security number on his request. I earned \$ 3000.00, with him not withholding my taxes.

He told me that my benefits will start after six months. (I started in February 2003) with all this I considered myself as an employee of this employer.

I did not have an access to his records to see if he reported me to the department of labor and industries on 03-15-2004.

I filed my tax return, where with my other job I reported my income from "Seattle Concrete Design" (see attached).

Because of my injury I had to undergo big surgery, extensive treatment I suffered a financial loss. Again, I don't know (and didn't know) any administrative relationships, employer-employee relationship and since I was a worker in that company I think (and thought) that I have all rights as his other employees.

Therefore I am asking you to take your decision in reconsideration and open my claim.

THANK YOU

MAY, 8 2004

FERID MASIC

Board of
Industrial Insurance Appeals

In re: Masic

Docket No. 0425602

Exhibit No. 4

ADM. 10/25/05 REJ.
Date

exH
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Appendix F

Notice of Representation

NOTICE OF REPRESENTATION & DIRECTION TO PROVIDE
COPY OF FILE

To: Department of Labor & Industries

RE: Injured Worker: Ferid Masic
Claim No: Y900479

Please take notice that the undersigned has hired:

Ann Pearl Owen
2407 - 14th Avenue South
Seattle, WA 98144
(206) 624-8637

to represent the undersigned on all matters regarding the above injured worker on the above and any other claim on all Industrial Insurance matters. Further the Department is hereby specifically instructed to issue all communications to me in care of the above named lawyer at the above address AND to provide my lawyer a copy of all documents related to the above numbered claim file.

Dated this 28th day of OCTOBER, 2004.

Ferid Masic

Injured Worker: Ferid Masic

Form Signed in the Presence of and Interpreted by:

R. M. ...

Interpreter

Board of
Industrial Insurance Appeals

In re: Masic

Docket No. 04 25602

Exhibit No. 0

ADM. 10/25/05 Date REJ.

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Appendix G

Mašić's notice of appeal at the Board

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FERID MAŠIĆ) DOCKET NO.:
)
CLAIM NO. Y900479) NOTICE OF APPEAL OF ALL DEPARTMENT
) ACTION/INACTION RE CLAIM INCLUDING BUT
) NOT LIMITED TO ORDERS OF 9/28/04 & 4/13/04

The Injured Worker, Ferid Mašić, appeals the subject decisions/orders/failure to make decisions/orders of the Department of Labor and Industries noted below stating:

1. Injured Worker's Residence Address:

3434 South 144th Street Apartment 133, Seattle, WA 98168

2. Subject Department Action/Letters/Determinations/Decisions/Orders:

The Injured Worker, Ferid Mašić, appeals all Department action/letters/determinations/decisions/orders, including the 9/18/04 and 4/13/04 orders, including before and after those dates.

NOTA BENE: All of the above referenced letters, decisions, and/or orders are in English. The Injured Worker is a an individual with a non-English-speaking cultural background whose is not fluent in English in either expressive or receptive oral or written language and, thus, one whose ability to read English is inadequate to understand the orders referenced, especially any notification contained in any letter, decision and/or order indicating any appeal requirements. The Injured Worker was not provided any of the above letters, decisions, and/or orders in his native language, Bosnian/Serbo-Croatian. Because of the above and the fact that the Department never explained to the Injured Worker what his rights under the Act were in his own language or the nature of any action, decision, order, request for information, and/or letter were, what action must be taken by him or what information was required of him, or what benefits he was entitled to under the law of Washington, he did not understand that failure to appeal from any of the above referenced orders within 60 days might operate as a waiver of any waive appeal rights concerning the issues decided in those orders.

The Injured Worker has never waived his right to translation services under RCW 2.42 and 2.43 regarding communications from the agency in question – The Department of Labor & Industries. The Injured Worker, Ferid Mašić, is of non-English speaking cultural background.

FIRST NOTICE OF APPEAL TO F

Industrial Board of Insurance Appeals
In re: Mašić
Docket No. 04 25602
Exhibit No. _____
 ADM. 10/25/04 Date REJ.

ANN PEARL OWEN, P.S.
2407 – 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

EXH
17

1
2 At no time the Department of Labor & Industries communicated with the Injured Worker in his
3 native language. At no time did the Department of Labor & Industries make any effort to inform the
4 Injured Worker of the need to take action within a given period of time in his own language. At no
5 time did the Department of Labor & Industries determine whether or not the Injured Worker
6 understood written English, could effectively read English, understood any decision, order, letter,
7 request for information or description of rights or duties under the Industrial Appeals Act available in
8 or sent to him in English.

9
10 When the Injured Worker protested the Department's determinations and requested through
11 counsel that the Department provide his lawyer a full copy of his file and provide him translation
12 services so that he could understand his rights and obligations under the Industrial Insurance Act and
13 play an active and knowing role in his claim determination or appeal, the Department failed to provide
14 any copy of the Injured Worker's file to his counsel and failed/refused to provide any translation
15 services to the Injured Worker, further depriving him of the ability to exercise his rights under the
16 Industrial Insurance Act. The Department even failed to provide the Injured Worker with an English
17 copy of its own interpreter provider services bulletin that purports to inform individuals about the
18 rights to interpreter for non-English speaking injured workers under the Department's interpretation
19 under the Act. The Department's refusal to inform the Injured Worker of his rights under the Act,
20 failure to provide his legal representative a copy of his claim, failure to respond to the Injured
21 Worker's letter of protest, and failure to provide a response to the Injured Worker's request for
22 interpreter services violates the Industrial Insurance Act and deprives the Injured Worker of his rights
23 under the Act, including his right to appeal letters, decisions, determinations, and orders under the Act
24 without due process and in violation of the Act, the State Constitution, RCW 2.42 and RCW 2.43.

25
26 The Department's policy on interpreter services, as indicated in its service provider bulletin,
violates the stated purposes and aims of the Industrial Insurance Act to protect the Injured Worker
against the financial problems that arise from industrial injuries, including such very expensive
services as interpreter services necessary only to deal with the results of the industrial injury, including
the Injured Worker's right to pursue benefits and the nature of benefits available under the Act.

The undersigned and the Injured Worker have sought and are unable to find any available free
translators for this particular language variously known as Bosnian or SerboCroatian.

3. Subject Department Communications/Actions Received in English:

Department Communications/Actions:	Date of Receipt in English:
All Communications Dates Not Known	Not Known
April 13, 2004 Order*	Not Known
September 28, 2004 Order**	Not Known
Failures/Refusals post 9/28/04	Never

FIRST NOTICE OF APPEAL TO BILA

ANN PEARL OWEN, P.S.
2407 - 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

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4. Date Of Receipt Of Department Communications/Actions In IW's Native Language:

Department Communications/Actions:	Date of Receipt in Bosnian/Serbo-Croatian:
All Communications Dates Not Known	Never
April 13, 2004 Order*	Never
September 28, 2004 Order**	Never
Failures/Refusals post 9/28/04	Never

5. Place of Injury: On job site near Factoria in King County, Washington.

6. Name and Address of Employer: Seattle Concrete Design, 3434 South 144th Street #301, Seattle, WA 98168

7. Nature of Injury: Severe circular saw lacerations to left arm and leg with serious hemorrhage, muscle damage, fear of death, permanent disfiguring scarring, atrophy, chronic pain, and limitation of strength with on-going psychiatric problems including intrusive thoughts of injury, fear of death, sleep problems, change in personality, depression, increased irritability, introversion, loss of sociability, altered relationships with wife and children, possible post traumatic stress disorder.

8. Date of Injury: June 29, 2003

9. Relief Sought: Reversal of orders dated April 13, 2004, September 28, 2004, orders and/or decisions [whether written or not] doing the following:

1. Denying payment of medical expenses
2. Denying any and all benefits under the Act
3. Apparently finding no employer-employee relationship [4/13/04 order]
4. Affirming 4/13/04 order [9/29/04 order]
5. Refusing/failing to provide copy of claim file to counsel
6. Refusing/failing to respond to request for copy of claim file for attorney
7. Refusing/failing to provide interpreter services under the Act
8. Refusing/failing to provide interpreter services requested by letter of 11/1/04
9. Refusing/failing to respond to request for interpreter services
10. Refusing/failing to provide information on rights under the Industrial Insurance Act
11. Refusing/failing to communicate in a language which the injured worker understands
12. Refusing/failing to pay for medical services for treatment of the injured worker's injuries
13. Refusing/failing to take action on the injured worker's protest/request for reconsideration of the order of 9/28/04 within one month of the request communicated to the Department by fax on 11/1/04 indicating why Department's determination in that order was incorrect

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ANN PEARL OWEN, P.S.
2407 - 14TH Avenue South
Seattle, WA 98144
(206) 624-8637

1 14. Any and all other action taken by the Department on this claim

2 15. Adopting the Interpreter Services Policies of the Department treating non-English
3 speaking injured workers differently and less favorably than English speaking injured
4 workers or than non-English speaking/Spanish-speaking injured workers for whom the
Department has communications in Spanish, while not providing any communications
with the Injured Worker in his own language.

5 **10. Basis for Relief Sought:** The letters, actions, determinations, decisions and orders,
6 whether written or not, described above are unjust or unlawful in that they are contrary to evidence and
7 the law, violate not only the Industrial Insurance Act and the Washington State Constitution, but also
8 RCW 2.42 and RCW 2.43; and deprive the Injured Worker of benefits under the Act which the Act was
intended to provide to this Injured Worker.

9 Injured Worker requests that he, as a person of non-English speaking heritage be treated equally to
10 English-speaking persons in dealings with State and the Department and be provided interpreter
11 services for all communications with the Department; the Board; his own counsel; the Attorney
12 General; the employer; all other representatives of the Board and the Department; all representatives
13 of the Attorney General; all representatives of the employer [including counsel]; and of all Board
14 proceedings including any and all conferences, motions, hearings, depositions in discovery,
15 depositions to perpetuate testimony, and any other communications whatsoever with the Industrial
Appeals Judge in which his counsel is expected to testify. These interpreter services if not paid by the
Department and/or the Board, will eat up a significant if not all of the Injured Worker's benefits,
further impoverishing him and his family [wife and two children dependent upon the Injured Worker],
contrary to the intent of the Industrial Insurance Act and RCW 2.42 and RCW 2.43.

16 **11. Requested Location for Conferences and Hearings:** Seattle, Washington

17 **12. SPECIAL NOTE: Interpreter Services To Be Provided at Department/Board Expense.**

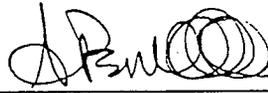
18
19 Because Ferid Mašić is not fluent in English, cannot effectively read English and has a non-English-
20 speaking cultural background, he qualifies for interpreter services under RCW 2.42 and RCW 2.43 at
21 Board/Department expense. Ferid Mašić has not and does not waive her right to interpreter services in
22 communications with the Department or with the Board of Industrial Insurance Appeals. Therefore,
23 he is entitled by statutes in the chapters of the RCW cited above to interpreter services for all
24 communications necessary for him to seek relief from the Department and the Board for Industrial
25 Insurance benefits under RCW Title 51. Ferid Mašić requests interpreter be provided to him by the
26 Department and/or the Board for all communications necessary in order for him to receive benefits
from the Department of Labor & Industries, including but not limited to the following: All
communications addressed to him, his lawyer, to any of his treating physicians, to any provider for the
Department, including all orders, letters, deadlines, jurisdictional histories and all contents of the
Board file on this appeal and on any subsequent appeal to the Superior Court so that Ferid Mašić can

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1 participate to assist in his representation on each and every such occasion the same is needed as a
2 function of his right to due process of law under both the United States and Washington State
3 Constitutions. Such interpreter services should be paid for by the Department of Labor & Industries
4 throughout, including any such expenses incurred in communications with his attorney as he would
not have incurred such expenses but for his industrial injury and but for the Department's
failure/refusal to ascertain his native language and communicate with him in that language.

5 DATED December 6, 2004,

6
7 

8 ANN PEARL OWEN, WSBA# 9033
9 Attorney for Injured Worker Ferid Mašić

10 * Attached as Exhibit A
11 ** Attached as Exhibit B

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Appendix H

Management Update



Management Update

Insurance Services: Claims Administration and Self-Insurance

Interpreter and Translation Services to Workers

Effective Date

08/13/2007

REVISED 08/17/07

Topic

Interpreter and
Translation Services
To Workers

Issuing Authority

Sandy Dziejdzic
Cheri Ward
Jean Vanek

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

Resources

AT&T Language Line Instructions

http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm

Online Reference System (OLRS)

<http://olrs.apps-inside.lni.wa.gov/>

Claims Training Bulletin: Translation Process

Management Memo: Spanish Translations

Training Handout: Services for the Hearing & Speech Impaired
WAC 296-20-2025

Contact Claims Training if you have any questions.

NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.

Appendix I

Department Provider Bulletin 05-04



PROVIDER BULLETIN

PB 05-04

THIS ISSUE Interpretive Services Payment Policy Effective July 1, 2005

TO:

Ambulatory Surgery Centers,
Audiologists, Chiropractic
Physicians, Clinics, Dentists, Drug
and Alcohol Treatment Centers,
Freestanding Emergency Rooms,
Freestanding Surgery Centers,
Hospitals, Interpretive Services
Providers, IME Exam Groups,
Massage Therapists, Naturopathic
Physicians, Nurses-ARNP,
Occupational Therapists, Opticians,
Optometrists, Osteopathic
Physicians, Pain Clinics, Panel
Exam Groups, Pharmacists,
Physicians, Physician Assistants,
Physical Therapists, Podiatric
Physicians, Prosthetists and
Orthotists, Psychologists,
Radiologists, Self-Insured
Employers, Speech Therapists &
Pathologists, Vocational Counselors

CONTACT: Provider Hotline
1-800-848-0811
From Olympia 902-6500

Loris Gies: PO Box 4322
Olympia, WA 98504-4322
(360) 902-5161
After July 1, 2005:
Karen Jost PO Box 4322
Olympia, WA 98504-4322
360-902-6803
Fax (360) 902-4249

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Purpose

This Provider Bulletin updates coverage and payment policies for interpretive services as required in WACs 296-20-02700 and 296-23-165. **This bulletin replaces Provider Bulletin's 03-01, 03-10 and 05-01.** The purpose of this bulletin is to notify providers and insurers of the following changes:

- Revised coverage and payment policy.
- Interpretive services provider qualifications.
- Revised interpretive services codes and descriptions.
- New fees for interpretive services.
- Limits on interpretive services.
- Verification of interpretive services requirement.

Interpretive Services for Healthcare and Vocational Services

This policy applies to interpretive services provided for healthcare and vocational services in all geographic locations to injured workers and crime victims (collectively referred to as "insured") having limited English proficiency or sensory impairments; and receiving benefits from the following insurers:

- The State Fund (L&I),
- Self-Insured Employers or
- The Crime Victims Compensation Program.

This coverage and payment policy including new fees, codes, service descriptions, limits and provider qualification standards is effective on and after July 1, 2005.

Policy Does Not Apply to Interpretive Services for Legal Purposes

This coverage and payment policy does not apply to interpretive services for injured workers or crime victims for legal purposes, including but not limited to:

- Attorney appointments.
- Legal conferences.
- Testimony at the Board of Industrial Insurance Appeals or any court.
- Depositions at any level.

Payment in these circumstances is the responsibility of the attorney or other requesting party(s).

Why Are Interpretive Services Covered?

The United States Department of Health and Human Services Office of Civil Rights concluded that inadequate interpretation for patients with Limited English Proficiency is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964. More information about the Civil Rights Act is available on the web at <http://www.hhs.gov/ocr/lep/>.

The Washington Workers' compensation law under RCW 51.04.030 (1) requires the provision of prompt and efficient care for injured workers without discrimination or favoritism. Therefore, interpretive services are covered so injured workers who have limited English proficiency or sensory impairments may receive prompt and efficient care.

Information for Healthcare and Vocational Providers

Insured individuals with limited English proficiency or sensory impairments may need interpretive services in order to effectively communicate with you. Interpretive services do not require prior authorization.

Under the Civil Rights Act, as the healthcare or vocational provider, **you** determine whether effective communication is occurring. If assistance is needed, then **you**:

- Select an interpreter to facilitate communication between you and the insured.
- Determine if an interpreter (whether paid or unpaid) accompanying the insured meets your communication needs.
- May involve the insured in the interpreter selection. **NOTE: Under the Civil Right Act, hearing impaired persons have the right to participate in the interpreter selection.**
- Should be sensitive to the insured's cultural background and gender when selecting an interpreter.

- The healthcare or vocational provider.
- Employee(s) of the healthcare or vocational provider whose primary job is not interpretation.
- Employee(s) of the healthcare or vocational provider whose primary job is interpretation but who is not a credentialed interpreter.

Persons Ineligible to Provide Interpretation/Translation Services

Some persons may not provide interpretation or translation services for injured workers or crime victims during healthcare or vocational services delivered for their claim. These persons are:

- The worker's or crime victim's legal or lay representative or employees of the legal or lay representative.
- The employer's legal or lay representative or employees of the employer's legal or lay representative.
- Persons under the age of eighteen (18). **NOTE: Injured workers or crime victims using children for interpretation purposes should be advised they need to have an adult provide these services.**

Persons Ineligible to Provide Interpretation/Translation Services at IME's

Under WAC 296-23-362 (3), "The worker may not bring an interpreter to the examination. If interpretive services are needed, the department or self-insurer will provide an interpreter." Therefore, at Independent Medical Examinations (IME), persons (including approved interpreter/translator providers) who may not provide interpretation or translation services for injured workers or crime victims are:

- Those related to the injured worker or crime victim.
- Those with an existing personal relationship with the injured worker or crime victim.
- The worker's or crime victim's legal or lay representative or their employees.
- The employer's legal or lay representative or their employees.
- Any person who could not be an impartial and independent witness.
- Persons under the age of eighteen (18).

Hospitals and Other Facilities May Have Additional Requirements

Hospitals, free-standing surgery and emergency centers, nursing homes and other facilities may have additional requirements for persons providing services within the facility. For example, a facility may require all persons delivering services to have a criminal background check, even if the provider is not a contractor or employee of the facility. The facility is responsible for notifying the interpretive services provider of their additional requirements and managing compliance with the facilities' requirements.

Fees, Codes and Limits

Why Is the Department Restructuring Fees and Codes?

A recent coverage and payment policy review showed the department's coding structure was not in line with interpreters' usual business practices. Therefore, the department decided the use of a single code for all payable services would work better for everyone. However, the department wanted to identify group services. So now there are two comprehensive codes for interpretive services—one for use with an *individual* client and one for use with multiple clients (*group*) at the same appointment.

In addition, the project's fee research showed the department was paying more than most other Washington State payers, who are paying between \$30 and \$50 per hour. The new coding structure includes all services; some of which the department had paid previously paid at \$30 per hour. The fee reduction takes into account the increased billing at full rate for all covered service time.

By law, the department has a responsibility to control benefits costs for the employers and injured workers who pay the workers' compensation insurance premiums.

Why Can't L&I Pay Interpreters a Minimum Fee?

Only services which are actually delivered to injured workers can be paid. With a minimum fee, the insurer might make part of the payment for undelivered services. This would violate the department's responsibility to employers and injured workers who pay the industrial insurance premiums.

Further, under WAC 296-20-010(5) the insurer can pay only for missed insurer arranged IME appointments. If there was a minimum interpretive services fee, the insurer might pay for missed appointments arranged by healthcare or vocational providers or by the insured. This would conflict with the WAC. **However, mileage is payable for missed and/or IME no show appointments since the mileage service was an incurred prior to the missed appointment.**

Some Services Don't Require Prior Authorization

Direct interpretive services (either group or individual) and mileage do not require prior authorization on open claims. Providers can check claim status with the insurer prior to service delivery.

Services prior to claim allowance are not payable except for the initial visit. If the claim is later allowed, the insurer will determine which services rendered prior to claim allowance are payable.

Only services to assist in completing the reopening application and for an insurer requested IME are payable unless or until a decision to reopen is made. If the claim is reopened, the insurer will determine which other services are payable.

Services at Insurer Request and/or Requiring Prior Authorization

IME Interpretation Services

When an IME is needed, the insurer will schedule the interpretive services. Prior authorization is not required. The insured may ask the insurer to use a specific interpreter. However, only the interpreter scheduled by the insurer will be paid. Interpreters who accompany the insured, without insurer approval, will not be paid nor allowed to interpret at the IME.

IME No Shows

For State Fund claims, authorization must be obtained prior to payment for an IME no show. For State Fund claims contact the Central Scheduling Unit supervisor at 206-515-2799 after occurrence of IME no show. Per WAC 296-20-010 (5) "No fee is payable for missed appointments unless the appointment is for an examination arranged by the department or self-insurer."

Document Translation

Document translation services are only paid when performed at the request of the insurer. Services will be authorized before the request packet is sent to the translator.

Fees, Codes, Service Descriptions and Limits

The hourly fee for direct interpretive services (either group or individual) is being adjusted from \$60 per hour to \$48 per hour. The IME no show fee is a flat fee of \$48. The mileage rate increased January 1, 2005 to 40.5¢ per mile (the state employee reimbursement rate). Document translation fee is now by report.

Limits in the L&I bill processing system will automatically deny services exceeding the maximum limit on a specific code or combination of codes. The following fees, service descriptions and limits on services apply to services on and after July 1, 2005:

Code	Description	How to Bill	Maximum Fee	L&I Code Limits
9988M	Group interpretation direct services time between two or more client(s) and healthcare or vocational provider, includes wait and form completion time, time divided between all clients participating in group, per minute	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9989M	Individual interpretation direct services time between one insured client and healthcare or vocational provider, includes wait and form completion time, per minute	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9986M	Mileage, per mile	1 mile equals 1 unit of service	State employee reimbursement rate (as of January 1, 2005 rate is 40.5¢ per mile)	Does not require prior authorization. Mileage billed over 200 miles per claim per day will be reviewed.
9996M	Interpreter "IME no show" wait time when insured does not attend the insurer requested IME, flat fee	Bill 1 unit only	Fiat fee \$48	Payment requires prior authorization- -Contact Central Scheduling Unit after no show occurs. Contact number: 206-515-2799. Only 1 no show per claimant per day.
9997M	Document translation at insurer request	1 page equals 1 unit of service	BR	Requires prior authorization, which will be on translation request packet. Services over \$500 per claim will be reviewed.

Covered and Non-covered Services

Covered Services

The following interpretive services are covered. When billed, payment is dependent upon service limits and department policy. Interpretive services providers may bill the insurer for:

- Interpretive services which facilitate communication between the insured and a healthcare or vocational provider.
- Time spent waiting for an appointment that does not begin at time scheduled (when no other billable services are being delivered during the wait time).
- Assisting the insured to complete forms required by the insurer and/or healthcare or vocational provider.
- A flat fee for an insurer requested IME appointment when the insured does not attend.
- Translating document(s) at the insurer's request.
- Miles driven from a point of origin to a destination point and return.

Non-covered Services

The following services are not covered and may not be billed to nor will they be paid by the insurer:

- Services provided for a denied or closed claim (except services associated with the initial visit for an injury or crime victim or the visit for insured's application to reopen a claim).
- Missed appointment for any service other than an insurer requested IME.
- Personal assistance on behalf of the insured such as scheduling appointments, translating correspondence or making phone calls.
- Document translation requested by anyone other than the insurer, including the insured.
- Services provided for communication between the insured and an attorney or lay worker legal representative.
- Services provided for communication not related to the insured's communications with healthcare or vocational providers.
- Travel time and travel related expenses, such as meals, parking, lodging, etc.
- Overhead costs, such as phone calls, photocopying and preparation of bills.

Interpreter Organizations

Several interpreter and translator professional organizations have information and educational opportunities for interpretive services providers. Their websites are listed below. This list is neither comprehensive nor an endorsement of any of these organizations. It is provided for informational purposes.

Organization	Website	Phone
Northwest Translators and Interpreters Society	www.notisnet.org	206-382-5642
Society Of Medical Interpreters	www.sominet.org	206-729-2100
National Association of Judiciary Interpreters and Translators	www.najit.org	206-267-2300
Washington Interpreters and Translators Society	www.witsnet.org	206-382-5690
Washington State Registry of Interpreters for the Deaf	www.wsrid.com	No number listed
National Council on Interpreting in Healthcare	www.ncihc.org	FAX 707-541-0437

L&I Publications

L&I publishes several handbooks and pamphlets related to the Workers' Compensation and Crime Victims Program. Some of them are available in Spanish and other languages.

Provider related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/Providers/FormPub/Pubs/default.asp>

Workers' compensation related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/Claims/FormPub/Pubs/default.asp>

Crime Victims Program related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/CrimeVictims/FormPub/default.asp>

Laws and Rules Relating to Interpretive Services

The following laws and rules contain relevant information for interpretive services providers and can be accessed at the Washington State Legislature's website <http://www.l.leg.wa.gov/LawsAndAgencyRules/>. Links to these laws and rules are located at the L&I home page <http://www.LNI.wa.gov/>.

RCW Chapter 5.60	Witnesses—Competency
RCW 2.43.010	Right to Interpreter Services in Legal Proceedings
RCW 51.04.030 (1)	Medical Aid Rules
RCW 51.28.030	Medical Aid Fund
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who may treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-02700	Medical Coverage Decisions
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-362	May a worker bring someone with them to an Independent Medical Examination (IME)?
GR 11.1	Code of Conduct for Court Interpreters
RCW Chapter 5.60	Witnesses

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 81759-6

SUPREME COURT OF THE STATE OF WASHINGTON P 2:59

FERID MAŠIĆ

Petitioner,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

CERTIFICATE OF SERVICE
BY RONALD B. CARPENTER
CLERK

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused a copy of the **Answer to Petition for Review** with attached **Appendices** to be delivered via ABC Legal Messenger, properly addressed to the attorney for the Petitioner, as follows:

ANN PEARL OWEN
2407 14TH AVENUE SOUTH
SEATTLE WA 98144-5014

DATED at Seattle, Washington, August 18th, 2008.



ALEXANDRA SYSSOEVA
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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188